No. 79-1711, 79-1754, 79-1760 and 80-12

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, ET AL.,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.
Respondents

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED BRIEF FOR RESPONDENTS, NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN

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QUESTIONS PRESENTED

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. §§1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution, as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act.

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LIST OF PARTIES

Petitioners in 79-1711 are Middlesex County Sewerage Authority, Bergen County Sewerage Authority, Passaic Valley Sewerage Commissioners, the Linden Roselle Sewerage Authority, and Middletown Sewerage Authority. One brief has been submitted on behalf of Middlesex County Sewerage Authority, Middletown Sewerage Authority, and Bergen County Sewerage Authority. A separate brief has been filed on behalf of Passaic Valley Sewerage Commissioners and the Linden Roselle Sewerage Authority. The petitioner in 79-1754 is the Joint Meeting of Essex and Union Counties. Petitioners in 79-1760 are the City of New York and Abraham Beame. Petitioners in 80-12 are the Environmental Protection Agency, Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army. National Sea Clammers Association and Gosta Lovgren are respondents in all petitions.

The following were also parties to the proceedings below, but have not participated in the instant petitions: New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, West Long Beach Sewer District, County of West Chester, Department of Environmental Facilities, City of Long Beach, and City of Glen Cove.

OPINIONS BELOW

The opinion of the court of appeals is reported at 616 F.2d 1222, and has been reproduced in the appendix accompanying the initial petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., No. 79-1711, at pp. 1a-36a. The judgment of the court of appeals is reproduced in the appendix to the petition for writ of certiorari of Middlesex County Sewerage Authority at pp. 37a-38a.

The opinion of the district court for the District of New Jersey is unreported officially, but appears at 12 E.R.C. 1118. The opinion and order of the district court have been reproduced in the appendix to the petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., at pp. 40a and 60a respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1980. A petition for writ of certiorari was filed on April 29, 1980 in No. 79-1711, and the petitions for certiorari in 79-1754 and 79-1760 were filed on May 5, 1980. A petition for a writ of certiorari was filed in No. 80-12 on July 3, 1980, pursuant to an extension of time granted by Mr. Justice Brennan on April 24, 1980. All petitions were granted on October 20, 1980, limited to the three questions stated herein (J.A. 48a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The two statutes principally involved herein are the Clean Water Act (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No.

95-217, 91 Stat. 1566), 33 U.S.C. §1251, et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., which have been reproduced in the appendix to the petition for a writ of certiorari filed on behalf of Middlesex County Sewerage Authority, et al., No. 79-1711 at pp. 73a-105a.

STATEMENT OF THE CASE

Respondent, National Sea Clammers Association, is an association whose members earn their livelihood through the harvesting of fish, oysters, and other shellfish from the ocean and ocean beds of the Atlantic Ocean, adjacent to the States of New York and New Jersey. Gosta Lovgren is a member of the National Sea Clammers Association, and is similarly employed. Petitioners include various federal, state, and local officials, as well as governmental departments, involved with environmental protection or sewage treatment and disposal.

On January 14, 1977, respondents, National Sea Clammers Association and Gosta Lovgren, instituted suit on their behalf and on behalf of all others similarly situated in the United States District Court for the District of New Jersey. Respondents' complaint alleges that the City of New York and various other municipalities in New York and New Jersey have in the past and continue to cause sewage, sludge, and waste materials, some of which are toxic, to be discharged into the Hudson River and into New York Harbor. (J.A. 23a). It is further alleged that this sewage and sludge which is released into the Hudson River and New York Harbor is carried into the waters of the Atlantic Ocean. It is further alleged that various municipalities and the Army Corps of Engineers have dumped and continue to dump toxic substances directly into the Atlantic Ocean. (J.A. 23a-24a). Respondents allege that some of this dumping and discharging is done pursuant to permits issued by the Army

Corps of Engineers and by the Environmental Protection Agency (J.A. 23a-24a, 30a-32a), but it is further alleged that the City of New York and the other New York and New Jersey municipalities also dump and discharge sewage, sludge, and other waste materials in a manner which does not comply with the requirements set forth in the applicable federal and state statutes or with the requirements of the permits issued by the Corps of Engineers and by the Environmental Protection Agency. (J.A. 37a).

The complaint alleges that during the summer of 1976, this dredging and discharging activity caused a massive and rapid growth of algae ranging in an area from the southwest portion of Long Island, New Jersey, to a point approximately due east of Cape May, New Jersey, and extending from a few miles offshore to more than twenty miles out to sea. (J.A. 25a). When this massive algal bloom died, its residuals settled on the ocean floor, creating a condition of anoxia, or oxygen deficiency, in and about the water near the ocean's floor. This condition resulted in the death and destruction of an enormous amount of marine life, particularly with respect to the shellfish and other ocean-bottom dwellers and other marine life unable to escape the blighted area. Since July is the normal spawning season for clams and other shellfish, the impact of this condition on future stocks of shellfish was extremely severe. As a result, the commercial fishing, clamming, and related industries, in which respondents earned their livelihood, were virtually destroyed.

In their complaint, respondents alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §40321, et seq., the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq., the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq., the Rivers and Harbors Act of 1899, 33 U.S.C. §407, the New York Environmental Conservation Law, N.Y. Environ. Con. Serv. §1-0101 (McKinney

1973), the New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 (1968), the federal common law of nuisance, and the Fifth, Ninth, and Fourteenth Amendments to the Constitution. The complaint seeks injunctive relief, damages, mandamus to compel compliance with statutory duties, the imposition of fines and penalties for certain of the violations alleged, the award to respondents of one-half of the fines assessed, and the reasonable expenses of litigation, including expert witness and attorneys' fees.

Petitioners moved to dismiss all claims pursuant to Rule 12(b), Federal Rules of Civil Procedure. Treating these motions as motions for summary judgment, the district court granted said motions as to each cause of action alleged. The district court dismissed the complaint, with prejudice, as to all claims except for two which arose under state law, which were dismissed without prejudice.

On appeal, the Third Circuit Court of Appeals reversed the judgment of the district court to the extent that the district court judgment dismissed respondents' claims under the Federal Water Pollution Control Act, the Marine Protection, Research, and Sanctuaries Act, and respondents' common law nuisance and maritime tort claims. The Third Circuit affirmed the district court's dismissal of respondents' Refuse Act claim, Federal Tort Claims Act, and state tort claims, and the Constitutional claims. With respect to the district court's dismissal of the National Environmental Policy Act claim, the Third Circuit vacated the district court's order with direction that this claim be remanded for consideration of the record developed on remand.

SUMMARY OF ARGUMENT

I.

The question of whether a private right of action should be implied under a federal statute is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). In such an analysis, the ". . . central inquiry remains whether Congress intended to create . . . a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). This Court has identified four factors which are relevant in determining legislative intent. *Cort v. Ash*, 442 U.S. 66 (1975).

Both the FWPCA and MPRSA contain special citizen suit provisions which enable private citizens to sue, subject to certain restrictions, to enforce the statutes. See 33 U.S.C. § 1365(a) and (b); 33 U.S.C. § 1415(g)(1) and (2). In addition, however, each statute also contains a savings clause specifically preserving rights and remedies available under any statute or common law. 33 U.S.C. § 1365(e); 33 U.S.C. § 1415(g)(5). The savings clauses provide for relief on two different bases. First, each statutory section unambiguously preserves existing rights and remedies available under any statute or common law. However, each statute also provides, in clear and unambiguous language, that the basic citizen suit provision does not constitute the exclusive means for enforcement for a violation of the statute. For example, the savings clause in the FWPCA provides that the rights of any person or class of persons " . . . to seek enforcement of any effluent standard or limitation . . . " is in no way restricted by any of the other provisions of the statutory section. Since any such effluent standard or limitation would be promulgated pursuant to the FWPCA, it is obvious that this specific language in the savings clause was intended to provide an implied remedy for actually injured persons, such as the respondents herein, for violations of the Act.

An analysis of the other *Cort* factors also clearly indicates the existence of an implied cause of action under both statutes. Both statutes, while providing relief which would benefit the public at large, are clearly intended to especially benefit those who earn their livelihood by fishing and harvesting the ocean's marine life. Moreover, implying such a cause of action under each statute would certainly be helpful to the accomplishment of the statutory purposes, which include the preservation and fostering of " . . . economic potentialities . . . " with respect to those industries dependent upon the ocean and marine life. See 33 U.S.C. § 1401(a). See also 33 U.S.C. § 1364(a). Finally, there can be no doubt but that water pollution of the Atlantic Ocean is an interstate problem as to which federal, rather than state, interests must predominate.

II.

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), this Court gave explicit recognition to the existence of a cause of action for federal common law nuisance. The plaintiff in that case was a state seeking to invoke the original jurisdiction of this Court in order to enjoin a public nuisance originating outside of that state. The Court spoke of several factors which justified the creation of common law rights in that case. For our purposes, the most pertinent factor discussed in the *City of Milwaukee* decision was the involvement of an interstate waterway. In this regard, the Court observed: "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " 406 U.S. at 105. This Court further explained that the presence of a state as a party was not a necessary precondition for the application of the federal common law of nuisance: "Thus, it is not only the character of the parties that requires us to apply federal law.

(Citations omitted) As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 'Where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law.' " 406 U.S. at 105, n. 6.

In the present case, petitioners in 79-1711, 79-1754, and 79-1760 have argued that the key element in the application of the federal common law of nuisance in the *Illinois v. City of Milwaukee* decision was the presence of a state as a party. This, however, is an overly restrictive reading of that decision. Where, as here, the alleged nuisance affects an interstate body of water, and where there is an interstate element in the cause and effect of the nuisance, there is no reason that a private party should be barred from seeking relief under the federal common law. The interstate, navigable waterway which is involved here is the Atlantic Ocean; the pollution which is the subject of this suit originated both in New York and in New Jersey; and the interests which are sought to be protected affect the entire New Jersey coastal region. Thus, the instant case is distinguishable from many of the decisions cited and relied upon by petitioners in which the nuisance had only intrastate effects on the navigable waterways of the United States.

It is respectfully submitted that this Court should endorse the formulation contained in the Restatement of Torts as the appropriate rule in suits alleging a cause of action under the federal common law of nuisance. The Restatement formulation should be applied to determine whether in fact there is a public nuisance, and whether the plaintiff has standing to recover damages for this alleged public nuisance. If the Restatement formulation were to be applied to the present case, it is quite clear that respondents would satisfy the requirement that their loss be different in kind from that suffered by the general public. Indeed, the present case is virtually in-

distinguishable from Illustration 11 under Section 821C of the Restatement (Second) of Torts, which states, "A pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance."

Finally, as demonstrated in Section III, it is clear that Congress expressly preserved common law rights in order to supplement the statutory scheme. Although courts can be expected to give considerable weight to statutory compliance in determining whether an activity is a public nuisance, it is apparent from the language and legislative history of the Federal Water Pollution Control Act that statutory compliance would not necessarily except a discharger from common law liability. Unless and until there is complete preemption of the environmental field by Congress, a federal common law will continue to be a necessary and effective supplement to the statutory and regulatory scheme.

III.

Neither the FWPCA nor the MPRSA has preempted any relief available pursuant to the federal common law of nuisance. Each statute contains a savings clause which specifically preserves all rights and remedies available " . . . under any statute or common law . . . " 33 U.S.C. § 1365(e); 33 U.S.C. § 1415(g)(5). Moreover, the legislative history of these Acts plainly indicates that the availability of a common law action for damages was not intended to be preempted by the statutes. Finally, the statutes themselves indicate that where Congress chose to preempt, it did so expressly in the statutes. See, e.g. 33 U.S.C. §§ 1322(f)(1) and 1370; 33 U.S.C. § 1416(d).

Moreover, the preservation of the federal common law of nuisance will effectuate the goals and policies of

the statutes. Each of the federal statutes anticipate, and indeed encourage, a certain degree of conflict with respect to the effluent or other standards which a discharger must satisfy. Thus, the mere fact of a potential conflict between such a limitation and a possible common law action is an insufficient basis to preempt the common law of nuisance. Equally importantly, the EPA has argued for the continued existence of the federal common law of nuisance, e.g. *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975), and its views are entitled to great weight. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *E.I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112 (1977). In applying the federal common law of nuisance, federal courts are fully equipped to tailor the relief necessary consistent with the equities of any particular case.

ARGUMENT

POINT I

The Citizens Suit Provisions of the FWPCA and MPRSA Are Not the Exclusive Means of Enforcement for Violations of Those Acts. The Savings Clauses of these Statutes Create Implied Causes of Action to Which Respondents May Avail Themselves.

In their Complaint, respondents alleged violations of the FWPCA, 33 U.S.C. § 1251 et seq. and the MPRSA, 33 U.S.C. § 1401 et seq. The district court dismissed respondents' claims under these two statutes, holding that the respondents' failure to give notice purportedly required by the citizens suit provisions contained in these Acts deprived the court of jurisdiction. The court of appeals reversed the holding of the district court, finding that the citizens suit provisions of the two statutes were not the exclusive means of enforcement for violations of the statutes. The court below held that there exists an implied cause of action available to respondents pursuant to the "savings clauses" contained in the statutes. See, 33 U.S.C. § 1365(e) (FWPCA); 33 U.S.C. § 1415(g)(5) (MPRSA).

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court established a four part test to determine whether a private remedy is implicit in a statute not expressly providing one. The factors are:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit, or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . .

> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78.

Subsequent decisions of this Court have further refined the mode of analysis to be applied in determining whether a private right of action is to be implied under a federal statute. In *Touche Ross and Co. v. Redington*, 442 U.S. 560 (1979), this Court held that the *Cort* factors are merely relevant to the inquiry of whether a private remedy is implied. Noting that the *Cort* factors are not entitled to equal weight, this Court stated:

> The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.

More recently, the Court has held that the issue "[W]hether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 13 (1979).

An analysis of the issue of whether a federal statute creates an implied cause of action must begin with the language of the statute itself. *Transamerica Mortgage Advisors, Inc. v. Lewis, supra.; Touche Ross and Co. v. Redington, supra.; Cannon v. University of Chicago*, 441 U.S. 677 (1979). Both the FWPCA and MPRSA contain citizens' suit provisions authorizing private citizens to sue to enforce the Act subject to certain statutory restrictions. See, 33 U.S.C. §1365 (a) and (b) (FWPCA); 33 U.S.C. §1415 (g)(1) and (2) (MPRSA). Each of these statutes, however, also contains a "savings clause". The "savings clause" in the FWPCA is typical and provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforce-

> ment of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

The court of appeals held that the citizens' suit provisions of the federal statutes in question created an implied cause of action in favor of persons, such as respondents herein, who have alleged actual economic harm as a result of violations of the respective statutes. Respondents submit that the language and legislative history of the statutes, as well as the analysis pursuant to the *Cort* factors, compels the conclusion that there exist implied causes of action under both the FWPCA and MPRSA.

Careful analysis of the "savings clauses" reveals that the phrase is, in certain important respects, a misnomer. To be sure, each "savings clause" specifically preserves existing rights ". . . under any statute or common law . . . to seek any other relief . . .". In addition, however, each clause creates new federal rights, available to respondents herein, and not subject to the notice or other requirements contained in the citizens suit provisions. The language of the savings clause indicates that, in addition, the citizens suit provision is *not* the exclusive means for enforcement for a violation of ". . . any effluent standard or limitation" contained in that Act. The language "to seek enforcement of any effluent standard or limitation" contained in 33 U.S.C. §1365(e) is clearly intended to constitute the Congressional declaration that the right of economically injured persons, such as respondents herein, to sue for enforcement of violations of the FWPCA is not limited as is the right of non-economically injured persons, to the basic citizen suit provisions.

The court of appeals analysis as to the independent significance of 33 U.S.C. §1365(e) for injured as opposed to non-injured parties is further supported by the fact that the basic citizen suit provision of the FWPCA limits relief to a "citizen," whereas the "savings clause" of that statute provides relief for "any person." A "citi-

zen" is defined, rather restrictively, in the statute as a "person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1365(g). The selection of the statutory language, of course, was a Congressional effort to comply with this Court's then recent decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972). No such restriction, however, is found in the statute's definition of person[1]. The Congressional selection of the definitions of "citizen" and "person" in the statute clearly indicates the intent to provide differing rights and remedies to different groups. The basic citizen suit provision was designed to afford certain remedies to non-injured members of the public who could satisfy the statutory requirements as to who constitutes a "citizen." Interference with such party's aesthetic, conservational, or recreational rights could certainly constitute an "adverse affect" within the meaning of the FWPCA. For such a party, the right to monetary damages ordinarily could not be shown, so that the specific and limited remedies available under the citizen suit provisions would clearly make that individual or entity whole. This, of course, would not be true with respect to an individual or a group of individuals who have suffered actual, economic injury as a result of a violation of FWPCA. Thus, the specific language of the "savings clause" of the statute makes it clear that while the rights and remedies of such a person under any statute or common law is in no way restricted by the basic citizen suit provisions and limitations, such an actually injured person is also entitled to maintain a suit for violation of "any effluent standard or limitation" under the Act pursuant to the "savings clause", where actual injury and damages can be shown.

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1. 33 U.S.C. §1362(5) defines the term "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body."

Respondents also submit that there is nothing in the legislative history to the contrary. Indeed, the petitioners' sole argument to the effect that there is a contrary legislative intent is the reference, in the legislative history, to the fact that the savings clause preserves rights "under any *other* law." See, S. Rep. No. 92-414, reported in 1972, U.S. Code Cong. & Adm. News 3668, 3746. The court of appeals was ". . . not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act." (App. 16a.) Petitioners suggest that the statutory language "any statute" is really meant to refer to "any other statute," i.e., any statute other than FWPCA itself. Petitioners' argument, however, fails to note the two-fold purpose served by the savings clause.

The legislative reference to "any other statute" is clearly intended to refer to the fact that rights and remedies under any statute or common law are, indeed, specifically preserved by the savings clause. This legislative reference, however, in no way negates the clear statutory mandate, also contained in the savings clause, that rights "under any statute . . . to seek enforcement of any effluent standard or limitation . . ." are preserved.

An analysis of the remaining *Cort* factors also clearly indicates the existence of an implied cause of action under the FWPCA and MPRSA. The first *Cort* factor was whether the plaintiff was "one of the class for whose *especial* benefit the statute was enacted, . . . that is, does the statute create a federal right in favor of the plaintiff?" As the court of appeals below correctly held, while the two Acts specifically grant remedies to non-injured persons suing on behalf of the public, it is clear that the "class for whose *especial* benefit the statute was enacted" must have been individuals who have suffered actual injury by the pollution. Plaintiffs are members of a class that earns its livelihood from the sea and are therefore especially damaged by ocean pollution. The general purpose clause of the FWPCA contains a provi-

sion that the national goal shall include the attainment of that "water quality which provides for the protection and propagation of the fish, shellfish, and wildlife." 33 U.S.C. §1251(a)(2). The FWPCA recognizes the potential economic disasters which may result from unabated pollution and for this reason, has granted certain emergency powers to the Administrator. Thus §504 of the Act provides:

> Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source, or combination of sources is presenting an imminent and substantial endangerment to the health of persons *or to the welfare of persons where such endangerment is to the livelihood of such persons, such as an inability to market shellfish,* may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary. 33 U.S.C. §1364(a). (Emphasis supplied.)

It is equally clear that the respondents are, with respect to the MPRSA, the "class for whose *especial* benefit the statute was enacted." Included in the MPRSA is a statutory Congressional finding that "[U]nregulated dumping of material into ocean waters endangers . . . economic potentialities" and accordingly, it is the policy of the United States" . . . to regulate the dumping of all types of materials into ocean water to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect . . . economic potentialities." 33 U.S.C. §1401(a) and (b). Moreover, in reviewing and evaluating applications for dumping permits pursuant to MPRSA, the Administrator is specifically required to consider, among other things, "the effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches." 33 U.S.C. §1412(a)(C).

The implication of a private right of action is also "consistent with the underlying purposes of the legislative scheme," and therefore, the *Cort* factor is also satisfied. This factor has been expanded by this Court in *Cannon v. University of Chicago, supra*, wherein this Court noted:

> when [a private right of action] is necessary or at least helpful to the accomplishment of the purpose, the court is decidedly receptive to its implication under the statute. 441 U.S. at 703.

As the court below noted, there can be no doubt that implying a private remedy on behalf of the respondents would certainly be "helpful" towards the effectuation of the purposes of both the FWPCA and MPRSA (App. 17a.) Moreover, the implication of a private remedy under the statutes would be entirely consistent with the general purposes of the Acts as well as the particular purposes in each Act of protecting and encouraging the propagation of marine life.

The fourth element in the *Cort* analysis also indicates Congress' intent to permit a private cause of action pursuant to the savings clauses in the statutes. As the court below aptly noted:

> Far from being an area of traditional state concern, water pollution of the Atlantic Ocean is an interstate phenomenon of federal concern as to which an implied private remedy in the federal courts should not be denied. (App. 17a.)

Moreover, the statutes themselves indicate the extent to which federal rather than state or local concerns must predominate. For example, the FWPCA has preempted the right of any state or political subdivision thereof or interstate agency from adopting or enforcing any effluent standard, prohibition, pretreatment standard or standard of performance which is less stringent than the effluent limitation, standard, or prohibition enacted pur-

suant to the Act. 33 U.S.C. §1370. Similarly, the MPRSA has prohibited any state from "adopt[ing] or enforce[ing] any rule or regulation relating to any activity regulated by this subchapter." 33 U.S.C. §1416(d). The statutes, therefore, clearly evidence the overriding federal concern in the areas regulated by the statutes.

POINT II

A Private Party Must Be Afforded Standing to Maintain a Federal Common Law of Nuisance Action for Alleged Damages Resulting From Ocean Pollution As a General Federal Question Under 28 U.S.C. §1331.

A. Analysis of *Illinois v. City of Milwaukee* Decision

As a result of this Court's landmark decision in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), a new and potentially effective remedy was made available to parties seeking relief in water pollution cases in the federal courts under the federal common law of nuisance. In that case, the Court found that Illinois could sue under federal common law to enjoin a public nuisance originating outside the state, but which was polluting property within Illinois. Illinois had moved to file a bill of complaint in the Supreme Court, alleging a federal common law right of action against four Wisconsin cities, among others, to abate pollution of Lake Michigan, a navigable interstate waterway. The Court found that the controversy was cognizable under its original jurisdiction since the plaintiff was a state. The Court noted, however, that its jurisdiction was non-exclusive, and therefore, exercise of original jurisdiction was discretionary.[2] The Court felt that it was ill-equipped as a fact finder in such disputes, and thus denied the motion for leave to file an original complaint.

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2. "We construe 28 U.S.C. §1251(a)(1) . . . to honor our original jurisdiction but to make it obligatory only in appropriate cases." 406 U.S. at 93.

The Court in *City of Milwaukee* then addressed the question of whether a federal forum was available to the plaintiff state. Federal jurisdiction could not be based on diversity of citizenship because a state is not considered a citizen of itself for purposes of diversity jurisdiction.[3] Federal jurisdiction, therefore, depended upon the existence of federal question, and the Court held that federal common law could be an independent basis for federal question jurisdiction in the federal courts. In support of this holding the Court stated: "The rationale of the 1875 grant of federal question jurisdiction — to ensure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally-created rights — is as applicable to judicially-created rights as to rights created by statute." 406 U.S. at 100 (quoting *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968)).

The *City of Milwaukee* Court spoke of three different factors which justified the creation of common law rights in that case. It is apparent from the Court's discussion of these factors, and the citation of cases concerning each, that all three factors need not be present in a given case in order for federal common law to be recognized. To the contrary, in any given case the presence of any one of these factors would justify the recognition of federal common law.

In *City of Milwaukee*, the Court first spoke of situations where federal common law had been implied from the substance of federal statutes. Illinois had alleged a federal common law right of action despite the availability of a remedy under the Federal Water Pollution Control Act.[4] However, the remedy authorized by that statute was a long conference procedure leading ultimately to amicable settlement.[5] The Court found that injunc-

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3. 28 U.S.C. §1332(a)(1). *See, Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482 (1894).

4. 33 U.S.C. §§1151-1175 (1970) (amended 1972).

5. 33 U.S.C. §1160(d)(1) (1970) (amended 1972).

tive relief would be consistent with the policy of the statute, which provided that, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by federal enforcement action." 406 U.S. at 104. The Court went on to observe: "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' " 406 U.S. at 103 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957)). In short, in light of the various federal environmental protection statutes which created causes of action in federal court to abate pollution of navigable waters, the implication of a remedy would further the federal interest by providing a uniform rule of decision in disputes over those waterways.

The Court next referred to situations where federal common law had been applied in suits between states or between a state and citizens of another state. Neither the constitution nor any statutes provided a rule of decision in such disputes, and the Court of necessity developed a federal common law to avoid the unsuitability of looking to the law of a particular state when two states were in dispute. Several examples of this application of federal common law as a rule of decision were cited by the Court in the *City of Milwaukee* opinion.[6] The Court

6. E.g., *New York v. New Jersey*, 256 U.S. 296 (1921) (state can be enjoined from dumping material into harbor that polluted waters of neighboring state); *New Jersey v. New York City*, 283 U.S. 473 (1931) (state can be enjoined from polluting coastal waters of another state); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (state enjoined from utilizing method of water drainage that adversely affected neighboring state); *Missouri v. Illinois*, 200 U.S. 496 (1906) (state has right to enjoin neighboring states' sanitation district from polluting water that flowed into plaintiff state); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (private business enjoined from discharging noxious fumes that polluted air of neighboring state). See also, *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (private business enjoined from dumping chemicals that polluted coastal waters of neighboring state).

quoted with approval from *Kansas v. Colorado*, 206 U.S. 46, in which it was observed that "Through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law." 406 U.S. at 105-106.

Finally, the Court stated that the application of federal common law was appropriate because of the involvement of an interstate waterway. In this regard, the Court observed: "Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.' " 406 U.S. at 105. The Court then went on to state in a footnote which has been the focus of much attention in the present suit: "Thus, it is not only the character of the parties that requires us to apply federal law. (citations omitted) As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 'Where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." 406 U.S. at 105, n.6.

Petitioners in 79-1711, 79-1754, and 79-1760 have proposed a narrow interpretation of this Court's decision in *Illinois v. City of Milwaukee*, and have attempted to restrict its holding to its particular facts. In their view, the key element in the application of the federal common law of nuisance was the presence of a state as a party. But as we have just seen, other factors were present which militated in favor of the application of the federal common law. It is respectfully submitted that this attempt to narrow the scope of this Court's holding in *Illinois v. City of Milwaukee* should be rejected. Where, as here, the nuisance affects an interstate body of water, and where there is an interstate element in the cause and effect of the nuisance, there is no reason that a private party should be barred from seeking relief under the federal common law. The need for the applica-

tion of a federal rule of decision is abundantly clear in the present case. The interstate, navigable waterway which is involved here is the Atlantic Ocean; the pollution which is the subject of this suit originated both in New York and in New Jersey; and the interests which are sought to be protected affect the entire New Jersey coastal region. The court of appeals below quite correctly observed that, "Relegating these litigants to possibly conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters. In order to give full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances." (App. 25a-26a.)[7]

It is important to note that the instant suit does not involve a nuisance which has only intrastate effects on a navigable waterway of the United States. Thus, many of the decisions cited and relied upon by petitioners have no application here. In *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), aff'd without opinion sub nom. *East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977), the court stated that, "No interstate effect is alleged in the complaint. The impact of the spill appears to be limited to Bridgeport Harbor." 421 F. Supp. at 1281. Similarly, in *Committee for Con. of Jones Falls Sewage System v. Train*, 375 F. Supp 1148 (D. Md. 1974), affirmed on other grounds, 539 F.2d 1006 (4th Cir. 1976) (en banc), the alleged pollution did not in-

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7. Application of the federal common law of nuisance should not depend upon the existence of an actual conflict between the laws of two or more states. Rather, federal law should apply because "the interstate nature of [the] controversy makes it inappropriate that the law of either state should govern." Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 n. 119 (1964).

volve any interstate effects. Indeed, the majority opinion noted:

> In controversies such as this one, there is present neither the reason nor the necessity for the invocation of a body of federal common law which was present in *Illinois v. Milwaukee*. This intrastate controversy is entirely local. The plaintiffs are Maryland citizens complaining of the conduct of public officials of the City and County of Baltimore, Maryland. 539 F.2d at 1009.

The majority opinion further stated that, "It is not contended that the alleged pollution of Jones Falls stream has any effect outside the State of Maryland, and no other state is complaining of it." *Id.* Thus, dismissal of the claims based on the federal common law of nuisance in the *Parsell* and *Jones Falls* cases was appropriate because of the absence of an interstate effect on the conduct in question. See, *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 520 (8th Cir. 1975). When a nuisance has only intrastate effects on a navigable waterway of the United States, a nuisance action under state law may be sufficient to vindicate the rights of a private party. This, however, is clearly not the situation in the case at hand.[8]

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8. Because of the important federal interest in the waters of the Atlantic Ocean and because of the interstate nature of the pollution in question in this suit, it is not necessary to decide whether an interstate effect is a necessary condition for the application of the federal common law of nuisance. We note, however, that conflicting views on this issue have been expressed by the lower courts. See, *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 630 (7th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3043 (U.S. July 28, 1980), where Judge Wisdom, sitting by designation, stated:

> We conclude, based on *Illinois v. Milwaukee* and the Federal Water Pollution Control act, that there is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution ef-

It should further be noted that many courts have recognized that the *City of Milwaukee* decision should not be restricted to its particular facts. Both the Second and Third Circuits have held that the United States can state a claim for relief under the federal common law. *United States v. Ira S. Bushey & Sons,* 346 F. Supp. 145 (D. Vt. 1972), aff'd 484 F.2d 1393 (2nd Cir. 1973), cert. denied, 417 U.S. 976 (1974); *United States v. Stoeco Homes,* 498 F.2d 597 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975). Similarly, in *Township of Long Beach v. City of New York,* 445 F. Supp. 1203, 1214 (D.N.J. 1978), the court held that a municipality is entitled to bring an action based on the federal common law of nuisance. In *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.,* 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980), the plaintiffs were municipal corporations who were required to spend public funds because of the pollution of an interstate waterway by acts done in another state. Standing to sue under the federal common law of nuisance was granted to those plaintiffs. Finally, in *Byram River v. Village of Port Chester,* 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended standing to a private corporation (Byram River

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NOTE 8 — *(Continued)*

fects. The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible.

See also, *United States v. Solvents Recovery Service of New England,* 496 F. Supp. 1127 (D. Conn. 1980), *In Re Oswego Barge Corp.,* 439 F. Supp. 312, 322 (N.D.N.Y. 1977) (denying crossmotion to dismiss federal common law claim for pollution of navigable waterway affecting only one state); *United States, ex rel. Scott v. United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973) (denying motion to dismiss claim for federal common law of nuisance for intrastate pollution of Lake Michigan). But see, *Ancarrow v. City of Richmond,* 600 F.2d 443 (4th Cir.), cert. denied, 444 U.S. 992 (1979); *Committee for Con. of Jones Falls Sewage System v. Train, supra; Reserve Mining Co. v. EPA, supra; Parsell v. Shell Oil Co., supra.*

Pollution Abatement Association), a municipal corporation (the Town of Greenwich), and a private individual who owned land on the river's bank.

In summary, the holding of the court of appeals below concerning the standing of private parties to sue under the federal common law of nuisance is consistent with the rationale of this Court's decision in *Illinois v. City of Milwaukee*. The time has now come to make explicit that which was implicit in the Court's decision. Although *Illinois v. City of Milwaukee* did not itself authorize suits by private parties under the federal common law of nuisance (because that issue was not then before the Court), an extension of the Court's rationale to private parties is now proper.

B. Restatement Formulation As to Standing and Damages

With regard to the formulation or source of a federal rule to govern actions sounding in the federal common law of nuisance, the court of appeals below stated, "While *Illinois v. City of Milwaukee* did not address this specific issue, we are convinced that the Court would apply the mode of analysis of *Lincoln Mills* and would look to the Restatement formulation as an appropriate source for a federal rule." (App. p. 27a).

It is respectfully submitted that the Court should accept this invitation from the court of appeals, and should endorse the Restatement formulation as the appropriate rule in suits alleging a cause of action under the federal common law of nuisance. We have already demonstrated in the preceding section that no valid reason exists for limiting standing to states or governmental entities. We have also noted above that no cause of action under the federal common law of nuisance should be recognized unless an interstate, navigable waterway of the United States is involved. If this interstate ele-

ment is satisfied, then the Restatement formulation should be applied to determine whether in fact there is a public nuisance, and whether the plaintiff has standing to recover damages for this alleged public nuisance.

> The Restatement defines public nuisance as follows:
> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience, or;
> (b) whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or;
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts, §821B (1979).

The Restatement then goes on to define who may recover damages as a result of a public nuisance. Section 821C of the Restatement provides, "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference." In the official comments to Section 821C, the authors of the Restatement make it clear that pecuniary loss to a plaintiff normally satisfies the requirement that the plaintiff's loss must be different in kind from that suffered by the general public in order to maintain an action for the public nuisance. Indeed, the

present case is virtually indistinguishable from Illustration 11 under Section 821C. Illustration 11 states, "A, pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these water, suffers pecuniary loss as a result. B, can recover for the public nuisance."

The case of *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), is also directly on point here. Although the court in *Tamano* did not discuss the federal common law of nuisance, the court was guided by general nuisance standards. In *Tamano* a group of commercial fishermen and commercial clam diggers sought damages as a result of a discharge in the waters of Casco Bay of approximately 100,000 gallons of oil from the tanker M/V Tamano. Defendants filed a motion to dismiss on the grounds that these plaintiffs did not have a legally cognizable interest in the coastal waters and marine life or shores which were claimed to have been injured by the spill. In denying these motions to dismiss as to the commercial fishermen and clam diggers, the court observed:

> The commercial fishermen and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the State of Maine. The injury of which they complain has resulted from defendants' alleged interference with *their* direct exercise of the public right to fish and to dig clams. It would be an incongruous result for the Court to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another, should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public. Indeed, in substantially all of those cases in which commercial fishermen using public waters have sought

> damages for the pollution or other tortious invasion of those waters, they have been permitted to recover. (Citations omitted) . . . In the view of this Court, to the extent their pecuniary losses can be established, the commercial fishermen and clam diggers should be entitled to recover for the same.

370 F. Supp. at 250.

Additional support for respondents' position regarding the award of damages in suits under the federal common law of nuisance is found in the Seventh Circuit's opinion in *City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980). In the *City of Evansville* case the Seventh Circuit rejected defendants' contention that the request by plaintiffs for damages rather than injunctive relief precluded the exercise of jurisdiction by the district court. The Seventh Circuit observed:

> We have held that plaintiffs are appropriate parties to maintain the cause of action asserted. The question of what relief, if any, they may be entitled to is independent of the Court's power to hear and decide the merits of the claim. Whether or not defendants have breached any obligations for which they should be held liable to plaintiffs will be determined by judge-made rules. The consequences of any breach of duty imposed by the courts are necessarily also determined by the courts. The remedies appropriate for the violation of duties imposed under the federal common law of water pollution will necessarily depend upon the facts in a particular case. We hold only that a request for damages does not preclude the exercise of jurisdiction of a claim arising under the federal common law of interstate water pollution. 604 F.2d at 1019. (Citations omitted).

As in the present case, defendants in the *City of Evansville* case apparently took the position that *Illinois v. City of Milwaukee* should be read narrowly, and relief in all

future cases arising under the federal common law of nuisance should be restricted to the relief involved in the City of Milwaukee case. The Seventh Circuit rejected this narrow reading of *Illinois v. City of Milwaukee*, reasoning:

> The sewer district seems to assert that the Supreme Court's decision in *Illinois v. Milwaukee* establishes a request for equitable relief as a "criterion" for maintaining a claim under the federal common law of interstate water pollution. We disagree. Plaintiffs in that case sought equitable relief because of the nature of the claimed injury. The Supreme Court's discussion of Illinois' right to maintain the action, therefore, focused on that type of claim. We find nothing in the opinion that supports the conclusion that equitable relief is exclusive or that a request for such relief is essential.

604 F.2d at 1019.

Finally, it is important to recall this Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where this Court held that a violation of the Fourth Amendment by a federal agent acting under color of federal authority gave rise to a federal cause of action for damages as a result of the agent's unconstitutional conduct. In reaching that decision, this Court stated:

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by the federal officials should hardly seem a surprising proposition . . . Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But "it is . . .well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong." *Bell v. Hood*, 327 U.S. at 684.

403 U.S. at 395-96.

In summary, the holding of the court of appeals concerning the availability of monetary damages to respondents was correct, and should be affirmed by this Court.

C. Relationship Between Federal Common Law of Nuisance and Environmental Statutes and Regulations

The non-federal petitioners have asserted that, "Because of its ad hoc nature the common law nuisance action does not contribute functionally to a sound system for control and regulation of environmental pollution and . . . conprehensive, legislative, and administrative regulation is better suited to that end." (Brief for Petitioners, Middlesex County Sewerage Authority, et al., at 9.) Petitioners further contend that it would be "oppressive" to impose the "unwritten standards of the federal common law of nuisance" on them in addition to the federal and state regulations with which they are already required to comply. (Brief for Petitioners, Passaic Valley Sewerage Commissioners, et al., at 16.)

In response to these contentions it should first be observed that there is little likelihood that courts will summarily reject whatever guidance may be afforded by the environmental statutes or regulations. Indeed, in *Illinois v. City of Milwaukee*, this Court remarked, "While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision." 406 U.S. at 103, n. 5. In addition, the comments to Section 821B of the Restatement (Second) of Torts state, "If there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, courts are slow to declare an activity to be a public nuisance if it complies with the regulation." (Comment H, Section 821B, Restatement

(Second) of Torts (1979)). Thus, in the present case, if petitioners can demonstrate at trial strict compliance with all applicable statutes, regulations, and permits, the trier of fact will no doubt give considerable weight to this in determining whether petitioners' conduct constitutes a public nuisance.

However, it should also be noted that the language and legislative history of the Federal Water Pollution Control Act and amendments, as well as EPA's own regulations, make it clear that statutory compliance would not necessarily except a discharger from common law liability. Sections 505(e) and 510 of the Act establish that in addition to enforcing the terms of the Act, an interested party may seek to enforce more stringent remedies or standards than those provided by the statute. 33 U.S.A. §§1365(e), 1370. See also, 33 U.S.C. §1251(b) and §1371. With regard to the saving clause in the Federal Water Pollution Control Act Amendments of 1972, the Senate report stated:

> It should be noted . . . that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92d Cong., First Sess. reported in 1972, U.S. Code Cong. & Ad. News 3668, 3746-47.

Finally, the Environmental Protection Agency has also stated that compliance with the terms of a permit does not "[a]uthorize any injury to private property or invasion of other private rights, or any infringement of federal, state, or local laws or regulations." 40 C.F.R. §122.11(d)(2).

Thus, it is clear that Congress expressly preserved common law rights in order to supplement the statutory scheme, and this Congressional intent has been

reaffirmed by the Environmental Protection Agency in its regulations. As previously noted, compliance with statutes and EPA regulations should be given considerable weight by the courts, but unless and until there is complete preemption of the environmental field by Congress, the federal common law will continue to be a necessary and effective supplement to the statutory and regulatory scheme.

POINT III

Neither the FWPCA Nor the MPRSA Has Preempted Relief Available to Respondents Pursuant to the Federal Common Law of Nuisance.

In their complaint, respondents sought relief pursuant to the federal common law of nuisance. The district court dismissed respondent's common law nuisance claim, holding that only governmental agencies can sue for relief under the federal common law of nuisance. The court of appeals reversed this holding of the district court and stated that the federal common law nuisance remedy recognized by this Court in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) is available in suits by private parties such as the respondents herein.

In Section II herein, respondents have presented arguments supporting the court of appeals' holding that relief pursuant to the federal common law of nuisance is available to private parties. Respondents shall, in this section, present their arguments for the proposition that neither the FWPCA nor the MPRSA has in any way preempted the federal common law of nuisance.

A. Where Congress Has Chosen to Preempt, It has Done So Expressly.

The non-federal petitioners have argued that the comprehensive regulatory schemes established by the

FWPCA and MPRSA clearly indicate Congressional intent to preempt the federal common law of nuisance. To the contrary, the statutes clearly indicate that where Congress has chosen to preempt, it has done so expressly.

The scope of preemption chosen by Congress in the area of ocean pollution is made clear by an analysis of the two statutes. For example, under the FWPCA, Congress has prohibited any state or political subdivision from adopting or enforcing any statute or regulation ". . . with respect to the design, manufacture, installation or use of any marine sanitation device on any vessel subject to the provisions of this section." 33 U.S.C. §1322(f)(1). In addition, the FWPCA also provides that neither a state, nor a political subdivision, nor interstate agency can either adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitations adopted pursuant to the statute. 33 U.S.C. §1370.

The scope of the preemption selected by Congress in the MPRSA is equally clear. Thus, the MPRSA prohibits any state from adopting or enforcing ". . . any rule or regulation relating to any activity regulated . . ." by this statute. 33 U.S.C. §1416(d).

It is clear, therefore, that when Congress has chosen to preempt activities relating to ocean pollution, it has done so expressly.

B. Both the Statutes and Legislative History Clearly Indicate That Congress Has Expressly Preserved the Availability of the Federal Common Law of Nuisance and Relief Thereunder.

An analysis of the statutes and their legislative history reveals the clear and unambiguous Congressional intent to specifically preserve rights and remedies available pursuant to the federal common law of nuisance.

Both the FWPCA and the MPRSA contain savings clauses specifically preserving a party's right under ". . . any statute *or common law* . . ." 33 U.S.C. §1365(e); 33 U.S.C. §1415(g)(5). As noted in Section II, the Senate Report concerning the Federal Water Pollution Control Act of 1972 provides:

> It should be noted . . . that the section would specifically preserve any rights, or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. *Compliance with requirements under this Act would not be a defense to a common law action for pollution damages.* (Emphasis supplied.) S. Rep. No. 414, 92nd Cong., 1st Sess. Reported in 1972 U.S. Code Cong. Ad. News 3668, 3746-47.

The specified language of the statutes' savings clauses, including the specific reference to preserving rights and remedies under "*common law*" plainly indicates that Congress did not intend the federal environmental statutes to preempt the developing case law in the area of the federal common law of nuisance.

C. Preservation of the Federal Common Law of Nuisance Will Effectuate the Goals and Policies of the FWPCA and MPRSA.

Recognizing the unambiguous language of the statutes and their legislative history, petitioners are compelled to argue that the continued existence of the federal common law of nuisance would constitute an impediment to the implementation and enforcement of the statutes. The short answer, of course, is that Congress recognized the potential for conflict, but specifically preserved rights and remedies available under the federal common law of nuisance.

Moreover, petitioners' arguments fail to consider the fact that the statutes themselves envisage, and in-

deed encourage, a certain degree of conflict with respect to the effluent and other standards that a discharger, whether a governmental or private party, must satisfy. For example, even where the EPA has promulgated an effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard or standard of performance, any state, political subdivision, or interstate agency is free to adopt a *more stringent* limitation or standard. 33 U.S.C. §1370. Moreover, should any more stringent standard or limitation be adopted, the statute specifically provides that any interested person may seek to enforce such a more stringent limitation or standard. 33 U.S.C. §1365(e).

It is especially significant to note that the EPA has argued for the continued existence of the federal common law of nuisance. See, e.g., *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975). This certainly suggests that the preservation of the federal common law of nuisance will enhance rather than disrupt the goals and policies of the federal environmental statutes. Moreover, as the agency primarily responsible for administering and enforcing these Acts, the views of the EPA entitled to great weight. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *E. I. DuPont DeNemours & Co. v. Train*, 430 U.S. 112 (1977).

Certain of the petitioners have also suggested that the preservation of the federal common law of nuisance, and the resulting possibility of judgments for damages thereunder, will thwart the governmental planning and decision-making necessary to comply with these statutes. Once again, the short answer to this argument is that Congress has considered these possibilities, but has determined that the goals and policies of the statutes would be better advanced by the specific preservation of rights and remedies available pursuant to the federal common law. Moreover, the application of common law nuisance principles involves a balancing of many factors, and the federal courts are, therefore, fully equipped

to tailor the relief necessary, consistent with the circumstances and equities in any particular case. A federal court required to apply common law nuisance principles can well be expected to exercise the necessary degree of judicial restraint and to consider and reconcile the potentially conflicting demands in any particular case. In this regard, the counsel of the Chief Justice is especially appropriate:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praisworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted . . . The decisional process for judges is one of balancing, and it is often a most difficult task. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures* (SCRAP), 409 U.S. 1207, 1217-1218 (1972).

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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